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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No.

ERLE E. PEACOCK, JR.,
Petitioner,

vs.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL, PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DUVAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of California School Administrators (ACSA) respectfully moves this Court for per-

mission to file the attached brief as amicus curiae in support of Erle E. Peacock, Jr. in the case of *Erle E. Peacock, Jr. v. Board of Regents of the Universities and State College of Arizona,* No. 74-2259, October 1974 Term. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

The issue of what type of due process hearing is appropriate when an administrator is suspended is of great interest to the members of ACSA for two principal reasons: the decision will be applied *to* them and the decision will be applied *by* them. Presently, there are a number of cases involving ACSA members pending in both federal and state courts respecting this issue.

ACSA believes its experience in public school administrative matters will be of great value to this Court in the disposition of this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS

INTEREST OF THE AMICUS CURIAE

The Association of California School Administrators (ACSA) is a nonprofit professional association comprised of more than 10,000 members who hold administrative or supervisory positions in California education. Its members represent school administrators serving at all levels from kindergarten through higher education in all of the more than 1,000 public school districts in the State. ACSA is the largest state school administrator's association in the United States.

The ACSA member, as school administrator, occupies a dual role. First, he is an employee of the board. Second, he is agent of the board of education and, correspondingly, a member of the management team. This dual role of its members gives ACSA a strong interest in what it believes to be the central issue in the instant case: what process is due when considering state action that substantially affects a school administrator's position qua administrator.

On the one hand, ACSA has a deep concern for the employment rights of its members. Accordingly, ACSA has adopted a professional and legal assistance plan for its members under which a member may qualify for professional or legal assistance in employment related situations. The primary criterion for such assistance is whether and to what extent due

process of law has been provided to the member. Pursuant to this plan, cases involving ACSA members are now pending in federal and state courts which the instant case might substantially affect. Moreover, all of these cases are at least in part brought about by the present failure to resolve clearly what we believe to be the central issue in the instant case. Therefore, the resolution of that issue by this court would serve to reduce the volume of litigation.

On the other hand, ACSA members, as members of the management team, are charged with assisting in the formulation of policies and guidelines regarding employees (including administrators) which must comply with judicial due process. In recent years, declining enrollment and inflation have necessitated reduction in force and consequent reassignment or dismissal of school administrative personnel. School managers are forced to take actions affecting the employment rights of administrators, but must satisfy the requirements of due process. For this reason also, clear and definitive court rulings are necessary.

Recent court decisions on due process hearings provide some guidance: *Goss v. Lopez,* 95 S.Ct. 729 (1975); *Arnett v. Kennedy,* 94 S.Ct. 1633 (1974); *Mitchell v. Grant,* 94 S.Ct. 1895 (1974), but it is unclear what effect these cases should have upon the suspension of school administrators. The instant case represents an opportunity for this Court to lay down basic guidelines of due process respecting the employment rights of public school administrators which would alleviate the present uncertainty and confusion.

Thus, ACSA has a very important twofold concern about the issue of what type of due process hearing is appropriate: how it should be *applied to administrators* and how it should be *applied by administrators.* Because of the considerable experience of its members in public school administrative matters, ACSA is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FAILS IN IMPORTANT RESPECTS TO PROPERLY CONSIDER THE ISSUE OF WHAT PROCESS IS DUE RESPECTING THE EMPLOYMENT RIGHTS OF A SCHOOL ADMINISTRATOR QUA ADMINISTRATOR.

A. The Decision Did Not Consider the Case of Goss v. Lopez, 95 S.Ct. 729 (1975).

In reaching the conclusion that a post-suspension hearing satisfied due process, the Ninth Circuit relied on two recent decisions of this Court, *Arnett v. Kennedy,* 94 S.Ct. 1633 (1974) and *Mitchell v. Grant,* 94 S.Ct. 1895 (1974). No mention was made of *Goss* decided by this Court on January 22, 1975, thirteen (13) days prior to the decision in the instant case. The court, because of its failure to consider the ruling in *Goss,* failed to apply a presumption in favor of a prior hearing where an administrator is removed from his position. Thus, in *Goss,* it was held that, to insure fairness in a student suspension proceeding, the student must be given notice of the charges and the opportunity to present his or her side. "Since

the hearing may occur almost immediately following the misconduct, it follows *as a general rule notice and a hearing should precede* the removal of the student from school." *Goss*, supra, at 740 (emphasis added).

This pre-suspension hearing rationale follows from a long line of cases which support the proposition that a pre-suspension hearing is favored whenever deprivation of a protected interest is involved. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment procedures); *Goldberg v. Kelly*, 398 U.S. 254 (1970) (welfare benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Fuentes v. Shevin*, 407 U.S. 67 (1971) (repossession of household goods); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (tenured professor); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (revocation of parole). Consequently, since the opinion in *Goss* supports the proposition that a due process hearing should precede suspension, the Ninth Circuit erred in its conclusion for the reason that the Court did not consider the holding of that case.

B. The Decision, By Mistaken Reliance on Arnett and Mitchell, Did Not Apply the Correct Standard to Determine What Process is Due.

The emphasis placed on *Arnett* and *Mitchell* by the Ninth Circuit to justify a post-suspension hearing is misplaced because the instant case was a summary suspension with no prior procedural protection.

1. *The Mitchell Case.* In *Mitchell*, this Court upheld the Louisiana sequestration statute allowing a

post-seizure hearing. In doing so, it pointed out that there were certain protections built into the statute to insure a fair result: the writ must issue upon specific facts shown by verified petition or affidavit, the showing must be made before a judge and issued only on his authority, a bond must be posted to protect any financial loss to the debtor, the debtor may seek immediate dissolution of the writ which must be ordered unless the creditor proves the grounds upon which it was issued, and the debtor may recover damages for loss of the use of the property as well as injury to social standing or reputation. "Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller." *Mitchell,* supra, at 1901.

All these procedural safeguards occur *prior* to property sequestration. In the instant case, no procedures were afforded before summary dismissal. The instant case, therefore, is more in keeping with the *Sniadach* and *Fuentes* decision wherein a pre-deprivation hearing was requested. In deciding *Mitchell,* this Court was careful to distinguish the facts of *Sniadach* and *Fuentes* from the *Mitchell* facts. In differentiating *Sniadach,* this court said, "In *Sniadach,* the Court also observed that garnishment was subject to abuse without valid claims, a risk minimized by the nature of the security interest here at stake and the protections to the debtor offered by Louisiana procedure". *Mitchell,* supra, at 1903. To highlight the protection in *Fuentes,* this Court stated, "The Florida law

under examination in Fuentes authorized repossession of the sold goods without judicial order, approval or participation." *Mitchell,* supra, at 1904. Finally, to uphold the Louisiana statute as meeting due process standards, this Court found, "Mitchell was not at the unsupervised mercy of the creditors and court functionaries. The Louisiana law provided for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking." *Mitchell,* supra, at 1904, 1905.

Thus, the Ninth Circuit wrongfully relied on the holding in *Mitchell* to sustain a post-suspension hearing. The facts here more closely resemble *Sniadach* and *Fuentes.* The distinctions made by this Court in those cases apply with equal force to distinguish *Mitchell* from the instant case and establish that a pre-suspension hearing should be provided.

2. *The Arnett Case.* In *Arnett,* this Court upheld the Lloyd-LaFollette Act provision that a full evidentiary hearing need not be granted prior to dismissal from a government held position. The Act provided, though, that an employee must be given written notice of the charges, a chance to file a written answer prior to removal, opportunity to make a personal appearance before an agency official, and written notice of the agency's decision stating the reasons the action was or was not sustained. Following this procedure, the employee may appeal and be entitled to an evidentiary trial type hearing.

Justice Powell, in his opinion, stated, "On balance, I would conclude that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests." *Arnett,* supra, at 1652. He reasoned, "These procedures minimize the risk of error in the initial removal decision. . . ." Id. In *Arnett,* just as in *Mitchell,* a check on the arbitrariness of any suspension decision existed prior to action being taken.

Accordingly, reliance on *Arnett* and *Mitchell* as the standard to be followed in the instant case is unwarranted. The post-suspension hearing in both cases was upheld pursuant to some type of prior procedural protection therefore minimizing the risk of error before suspension or deprivation of property. The correct standard to determine due process in this case would be to follow the line of cases culminating in *Goss* which require a pre-suspension hearing.

C. The Decision, In Balancing the Interests of the Parties, Did Not Give Proper Weight to the Loss of an Administrative Position.

To determine the nature of the hearing to be granted in the instant case, the Ninth Circuit balanced the interests of the individual and the university. In that balancing, the court considered the individual's interest as Head of the Department to be "relatively slight." The court failed to adequately distinguish between performance as an administrator and performance as a teacher or surgeon.

As modern society increased in size and complexity, the administration of its institutions of necessity became increasingly stratified. Managerial positions were defined and created to insure the smooth operation of these institutions. Such positions are commonplace in the business world, but educational administration is relatively new among the nation's professions.[1]

To administer educational institutions (primary, secondary, university, as well as the professional schools of medicine, law, and dentistry), skills, training, and abilities are required that are different from the area supervised. Numerous textbooks have been written pointing out such differences.[2] Leadership, organization, decision making, policy coordination, evaluation, financial management are qualities necessary to successful performance. The individual in administration devotes his or her time to acquiring, developing, and applying this expertise. Consequently, a new role or profession has been created, that of administrator.

To consider the loss of the position as Head of the Surgery Department of a state university as "relatively slight" is to misunderstand the administrative function of the educational process and the operation of a university hospital. To remove an administrator from that role is to deprive him of an occupation; to

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[1]M. Nolte, AN INTRODUCTION TO SCHOOL ADMINISTRATION 46 (1966).

[2]E. Morphet, R. Johns, T. Reller, EDUCATIONAL ORGANIZATION (2d ed. 1966); S. Umans, THE MANAGEMENT OF EDUCATION (1970); M. Nolte, AN INTRODUCTION TO SCHOOL ADMINISTRATION (1966).

say he can return to the profession of teacher or surgeon is to say he can return to another profession. The role of administrator has been lost to him.[3]

The proper weight to be given the loss of an administrative position is substantial and should have been considered when determining the type of hearing required.

II. THE DECISION AFFECTS THE MANNER IN WHICH EMPLOYMENT GUIDELINES MUST BE DRAWN BY PUBLIC SCHOOL DISTRICTS TO COMPLY WITH DUE PROCESS.

California statutes cover the evaluation, suspension, and dismissal of school personnel. California Education Code §§ 13485-13490, 13408, 13411, 13412, 13402-13450. This comprehensive coverage requires implementing procedures to be adopted by all school districts in the State.

In formulating such procedures, school districts must also conform these procedures to the federal requirements of due process since property and liberty interest may be involved. In *Roth*, supra, at 577, this

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[3]INDEED, ONE ADMINISTRATOR WITH OVER 50 YEARS' EXPERIENCE RECENTLY EXPRESSED THIS CONCEPT IN THE FOLLOWING MANNER: "Rapid changes in both curriculum, and methodology in the teaching fields from which administrators are drawn erode the effectiveness of administrators as teachers if returned to the classroom. Such a return may be injurious to the pupils concerned; it may also be destructive to the mental health of dedicated professionals whose happiness is tied up with successful service in whatever role they are assigned. To school administrators, arbitrary reassignment to the classroom without supporting *objective* evidence to justify it is tantamount to capricious professional assassination." F. Honn, A PROPOSED POSITION PAPER REGARDING REASSIGNMENT OF CO-ADMINSTRATORS, 3, 4 (1975).

Court found, "Property interests are not created by the Constitution, rather, by existing rules or understandings that secure certain benefits and that support claims of entitlement to these benefits." California statutes and school district policies have created such property rights. Additionally, the suspension of an administrator may involve a liberty interest where it imposes on him a stigma or other disability that forecloses his freedom to take advantage of employment opportunities. . . ." *Roth,* supra, at 573. This court has ruled that whenever such a property or liberty interest exists, a hearing of some kind must be held, before suspension.

In sum, guidance is needed for the California school administrator, to know what process is due respecting a university or school administrators' employment rights. "The school administrator has a unique relationship to the Constitution. He must chart the course of the schools with little more to guide him than the hidden meaning in a court decision."[4] Without clear direction from this Court, California school districts and administrators will become entangled in legal claims and controversies over the question of which cases are controlling in this type of situation; those requiring pre-suspension hearing or those requiring post-suspension hearing. A resolution of this question is necessary.

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[4]M. Nolte, DUTIES AND LIABILITIES OF SCHOOL ADMINISTRATION 7 (1973).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, we respectfully submit that the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 25, 1975.